

HON. ROBERT J. BRYAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

WASTE ACTION PROJECT,

Plaintiff;

v.

UNION PACIFIC RAILROAD COMPANY,

Defendant.

Case No. 11-5810RJB

CONSENT DECREE

I. STIPULATIONS

Plaintiff Waste Action Project sent a sixty day notice of intent to sue letter to Defendant Union Pacific Railroad Company ("Union Pacific") on July 29, 2011, alleging violations of the Clean Water Act, 33 U.S.C. § 1251 et seq., relating to discharges of stormwater from Union Pacific's facility in Fife, Washington and seeking declaratory and injunctive relief, civil penalties and attorneys' fees and costs.

Union Pacific denies any fault, wrongdoing, or liability regarding all claims and alleged violations.

Waste Action Project and its counsel have no present intention to initiate a Clean Water Act suit against any other Union Pacific facility.

Waste Action Project and Union Pacific agree that settlement of these matters is in the

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p. 1

Smith & Lowney, p.l.l.c.
2317 East John St.
Seattle, Washington 98112
(206) 860-2883


best interest of the parties and the public, and that entry of this Consent Decree is the most appropriate means of resolving this action.

Waste Action Project and Union Pacific stipulate to the entry of this Consent Decree without trial, adjudication, or admission of any issues of fact or law regarding Waste Action Project's claims or allegations set forth in its complaint and its sixty-day notice.

DATED this October 19, 2012

JOYCE ZIKER PARKINSON PLLC


SMITH & LOWNEY PLLC

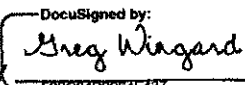
By 
Stephen T. Parkinson, WSBA #21111
Attorneys for Defendant
Union Pacific Railroad Company

By s/Richard A. Smith
Richard A. Smith, WSBA #21788
Attorneys for Plaintiff
Waste Action Project

UNION PACIFIC RAILROAD COMPANY

WASTE ACTION PROJECT

By 
Title: 10/19/12

DocuSigned by:

582C4A8B964F437
Greg Wingard
Title: Executive Director

II. ORDER AND DECREE

THIS MATTER came before the Court upon the foregoing Stipulations of the parties. Having considered the Stipulations and the promises set forth below, the Court hereby ORDERS, ADJUDGES, and DECREES as follows:

1. This court has jurisdiction over the parties and subject matter of this action.
2. Each signatory for the parties certifies for that party that he or she is authorized to enter into the agreements set forth below.
3. This Consent Decree applies to and binds the parties and their successors and assigns.
4. This Consent Decree applies to the operation, oversight, or both by Defendant Union Pacific Railroad Company ("Union Pacific") of its Facility, as defined in 40 C.F.R. §122.2, at 3330 20th Street East, Fife, Washington 98424 (the "Facility").

1 5. This Consent Decree is a full and complete settlement of the claims in the
2 complaint and all other claims known and unknown existing as of the date of entry of this
3 Consent Decree, that could be asserted under the Clean Water Act, 33 U.S.C. §§ 1251-1387,
4 arising from operations of the Facility. These claims are released and dismissed with prejudice.
5 Enforcement of this decree is Waste Action Project's exclusive remedy for any violation of its
6 terms.

7 6. This Consent Decree is a settlement of disputed facts and law. It is not an
8 admission or adjudication regarding any allegations by Waste Action Project in this case or of any
9 fact or conclusion of law related to those allegations. It is not evidence of any wrongdoing or
10 misconduct on the part of Union Pacific.

11 7. Union Pacific agrees to the following terms and conditions in full and complete
12 satisfaction of the claims covered by this decree:

13 a. Union Pacific will comply fully with all conditions of its National Pollutant
14 Discharge Elimination System Permit No. WAR001153 (the "*NPDES permit*") and any
15 successor, modified, or replacement permit;

16 b. Not later than the date of entry of this Consent Decree, Union Pacific will
17 amend its Storm Water Pollution Prevention Plan ("SWPPP") to include and incorporate
18 the spill prevention and control best management practices ("BMPs") of the locomotive
19 fueling contractor that services the Facility, and a requirement that all locomotive fueling
20 at the Facility be in accordance with such BMPs.

21 c. Not later than the date of entry of this Consent Decree, Union Pacific will
22 dispose of or store under storm resistant cover any stockpiled scrap metal, including pipes,
23 at the Facility.

24 d. Not later than the date of entry of this Consent Decree, Union Pacific will
25 either contain, or collect and dispose of, the treated wood debris that accumulated near the
26 Facility's waste disposal areas, and amend its SWPPP to include BMPs to clean up or

1 contain future accumulation of treated wood debris at the Facility.

2 e. Not later than one hundred twenty (120) days after entry of this Consent
3 Decree, Union Pacific will construct a concrete spill containment pad beneath its above-
4 ground diesel storage tank and a roof over the tank to prevent direct entry of precipitation
5 onto the spill containment pad. The roofing material will be of a type that does not leach
6 metals into stormwater.

7 f. For one year commencing on the first sampling event following entry of
8 this Consent Decree, Union Pacific will collect quarterly samples at three of the pipes
9 located along the earthen ditch to the south of the Facility's current stormwater monitoring
10 locations. The three pipes will be approximately equidistant from each other. Union
11 Pacific will follow the sampling and analysis procedures of Condition S4. of the NPDES
12 Permit, except that Union Pacific will analyze only the copper and zinc concentrations of
13 each sample.

14 g. Union Pacific will forward copies of all written or electronic
15 communications between it and the Department of Ecology concerning its compliance
16 with the NPDES permit and the Clean Water Act, including but not limited to discharge
17 monitoring reports, and the results of its quarterly samples described in subsection (f.) of
18 this paragraph seven (7) to Waste Action Project on or before the NPDES permit's
19 quarterly due dates for discharge monitoring reports. This obligation will continue
20 through the termination date of this Consent Decree.

21 8. Not later than 30 days after the entry of this Consent Decree, Union Pacific will
22 pay \$20,000.00 (TWENTY THOUSAND DOLLARS) to EarthCorps for the Sha Dadx and Swan
23 Creek habitat restoration projects, described in Attachment A to this Consent Decree. Checks
24 shall be made to the order of EarthCorps. Payment shall be sent to: Steve Dubiel, EarthCorps,
25 6310 NE 74th Street, Suite 201E, Seattle, Washington, 98115. Payment shall include the
26 following reference in a cover letter or on the check: "Consent Decree, WAP v. Union Pacific

1 RR” A copy of each check and cover letter, if any, shall be sent simultaneously to: Greg
 2 Wingard, Waste Action Project, P.O. Box 4832, Seattle, WA 98194. This payment shall not be
 3 considered a penalty under the Clean Water Act.

4 9. Union Pacific will pay Waste Action Project’s reasonable attorney and expert fees
 5 and costs in the amount of \$15,000.00 (FIFTEEN THOUSAND DOLLARS). Payment will be
 6 made within 30 days of the entry of this decree by check payable and mailed to Smith & Lowney,
 7 PLLC, 2317 East John St., Seattle, WA 98112, attn: Richard A. Smith. This payment is full and
 8 complete satisfaction of any claims Waste Action Project may have under the Clean Water Act
 9 for fees and costs.

10 10. A force majeure event is any event outside the reasonable control of Union Pacific
 11 that causes a delay in performing tasks required by this decree that cannot be cured by due
 12 diligence. Delay in performance of a task required by this decree caused by a force majeure event
 13 is not a failure to comply with the terms of this decree. If a force majeure event occurs, Union
 14 Pacific shall notify Waste Action Project of the event; the steps that Union Pacific will take to
 15 perform the task; the projected time that will be needed to complete the task; and the measures
 16 that have been taken or will be taken to prevent or minimize any impacts to stormwater quality
 17 resulting from delay in completing the task.

18 Union Pacific will notify Waste Action Project of the occurrence of a force majeure event
 19 as soon as reasonably possible but, in any case, no later than fifteen days after the occurrence of
 20 the event. In such event, the time for performance of the task will be extended for a reasonable
 21 period of time following the force majeure event.

22 By way of example and not limitation, force majeure events include

- 23 a. Acts of God, war, insurrection, or civil disturbance;
- 24 b. Earthquakes, landslides, fire, floods;
- 25 c. Actions or inactions of third parties over which defendant has no control;
- 26 d. Unusually adverse weather conditions;

- e. Restraint by court order or order of public authority;
- f. Strikes; and
- g. Litigation, arbitration, or mediation that causes delay.

11. This court retains jurisdiction over this matter. And, while this decree remains in force, this case may be reopened without filing fee so that the parties may apply to the Court for any further order that may be necessary to enforce compliance with this decree or to resolve any dispute regarding the terms or conditions of this decree. In the event of a dispute regarding implementation of, or compliance with, this decree, the parties must first attempt to resolve the dispute by meeting to discuss the dispute and any suggested measures for resolving the dispute. Such a meeting should be held as soon as practical but must be held within 30 days after notice of a request for such a meeting to the other party and its counsel of record. If no resolution is reached at that meeting either party may file a motion with this court to resolve the dispute.

12. The parties recognize that, pursuant to 33 U.S.C. § 1365(c)(3), no consent judgment can be entered in a Clean Water Act suit in which the United States is not a party prior to 45 days following the receipt of a copy of the proposed consent judgment by the U.S. Attorney General and the Administrator of the U.S. EPA. Therefore, upon the signing of this Consent Decree by the parties, Waste Action Project shall serve copies of it upon the Administration of the U.S. EPA and the Attorney General.

13. This Consent Decree takes effect upon entry by the court. It terminates two years after that date.

14. Both parties have participated in drafting this decree.

15. This Consent Decree may be modified only upon the approval of the court.

16. If for any reason the court should decline to approve this Consent Decree in the form presented, this Consent Decree is voidable at the discretion of either party. The parties agree to continue negotiations in good faith in an attempt to cure any objection raised by the court to entry of this Consent Decree.

1 17. Notifications required by this Consent Decree must be in writing. The sending
2 party may use any of the following methods of delivery: (1) personal delivery; (2) registered or
3 certified mail, in each case return receipt requested and postage prepaid; (3) a nationally
4 recognized overnight courier, with all fees prepaid; or (4) e-mail. For a notice or other
5 communication regarding this decree to be valid, it must be delivered to the receiving party at the
6 addresses listed below or to any other address designated by the receiving party in a notice in
7 accordance with this paragraph 17.

8 **if to WAP:**

9 Waste Action Project
10 P.O. Box 4832
11 Seattle, WA 98194
12 email: gwingard@earthlink.net

13 **and to:**

14 Smith & Lowney PLLC
15 2317 East John St.
16 Seattle, WA 98112
17 email: rasmithwa@igc.org

18 **if to Union Pacific:**

19 Robert Bylsma
20 Union Pacific Railroad Company
21 10031 Foothills Blvd., Suite 200
22 Roseville, CA 95747-7101
23 email: rcbylsma@up.com

24 **and to:**

25 Stephen Parkinson
26 Joyce Ziker Parkinson PLLC
 1601 5th Avenue
 Suite 2040
 Seattle, WA 98101
 email: sparkinson@jzplaw.com

 A notice or other communication regarding this Consent Decree will be effective when
 received unless the notice or other communication is received after 5:00 p.m. on a business day,

1 or on a day that is not a business day, then the notice will be deemed received at 9:00 a.m. on the
 2 next business day. A notice or other communication will be deemed to have been received: (a) if
 3 it is delivered in person or sent by registered or certified mail or by nationally recognized
 4 overnight courier, upon receipt as indicated by the date on the signed receipt; or (b) if the
 5 receiving party rejects or otherwise refuses to accept it, or if it cannot be delivered because of a
 6 change in address for which no notice was given, then upon that rejection, refusal, or inability to
 7 deliver; or (c) for notice provided via e-mail, upon receipt of a response by the party providing
 8 notice or other communication regarding this Consent Decree.

9
 10
 11 DATED this 21st day of Dec, 2012.

12
 13 
 14 HON. ROBERT J. BRYAN
 15 UNITED STATES DISTRICT JUDGE

16
 17 Presented by:

18 JOYCE ZIKER PARKINSON PLLC

SMITH & LOWNEY PLLC

19
 20 By 

By s/Richard A. Smith

Stephen T. Parkinson, WSBA #21111

Richard A. Smith, WSBA #21788

21 Attorneys for Defendant

Attorneys for Plaintiff

22 Union Pacific Railroad Company

Waste Action Project